IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.759 OF 2004

Santosh Nathuram Mhatre ...Appellant.
R/at Vashi, Tal:Pen,
District: Raigad.
(at present serving the sentence of
rigorous imprisonment at Alibag jail)

V/s.

The State of Maharashtra ...Respondent.

WITH
CRIMINAL APPEAL NO.1277 OF 2006

The State of Maharashtra ...Appellant.

V/s.

Santosh Nathuram Mhatre
R/at Vashi, Tal:Pen,
District: Raigad.
(at present serving the sentence of
rigorous imprisonment at Alibag jail) ...Respondent.

Ms.S.V.Gajare, APP for the Appellant/State.
Mr.S.V.Gavand, adv. for the Respondent.

CORAM: J.H.BHATIA, J.
DATE : 2nd April, 2007.

ORAL JUDGMENT:

1. Both these appeals may be disposed off by the common judgment and order as one appeal is filed by the accused challenging his conviction and sentence while another appeal is preferred by the State for enhancement of the sentence.

2. Prosecution case in brief, is that the

prosecutrix was 14 and half years of age at the time of the incident and was studying in VIIth standard. She was living with her parents, brothers and sisters at Village:Vashi. The accused was also living in the same locality at a short distance from the house of the prosecutrix. He was already married and had one daughter and one son. However, his wife had expired. Prosecutrix was engaged for the purpose of doing household works and to look after the minor children of the accused. He was then aged about 29 years. According to the prosecution on 14-11-2002 at about 2.30 p.m. the prosecutrix left her parents' house saying that she was going to her maternal uncle. However, till 6.00 p.m. she did not return home. Thereafter, enquiry was made and it was found that she had not gone to her maternal uncle. Therefore, on 15-11-2002 her father Chandrakant Patil lodged a missing report at Vadkhal Police Station. On 25-11-2002 he lodged another report at the police station alleging that since 14-11-2002 when the prosecutrix had left the parents house, accused was also not seen in the village and he had received information that the accused was seen with the prosecutrix. On the basis of this report, crime no.92 of 2002 under Section 366 of the I.P.C. came to be registered against the present accused. Photographs of the prosecutrix and the accused were distributed and

finally they were traced in a rented house of one Sakharam Patil at Village: Gadab. The prosecutrix and the accused both were taken in custody and to the police station. Both were subjected to medical examination. Statement of the prosecutrix revealed that the accused had taken her to village:Gadab by promising her to marry her. They had lived together for about 15 days and they had also sexual relations during that period. After investigation chargesheet was filed and the accused was put to trial for the offences punishable under Sections 366 and 376 of the I.P.C. Accused pleaded not guilty.

3. On behalf of the prosecution in all 6 witnesses were examined. They included P.W.1 Chandrakant Patil, who is the father of the prosecutrix, P.W.2 prosecutrix herself, P.W.3 Dr.Mahananda Mhatre, P.W.4 Gajanan Patil Head-master of the school, where prosecutrix was taking education, P.W.5 Dr.Uttam Javale radiologist and P.W.6 was Head-constable Manjunath Naik, who had investigated the case. After hearing the prosecution evidence, the learned Trial Court came to a conclusion that at the time of the alleged incident, prosecutrix was aged about 14 and half years and she was subjected to sexual intercourse by the accused. She was allured to accompany him to village:Gadab by giving her promise of marriage and during the period of about 15 days when

they were staying at village:Gadab, they used to have sexual intercourse. The learned trial Court found that as the prosecutrix was less than 16 years age, her consent for sexual intercourse was not material and therefore, the accused had committed the offence of rape. As she was less than 18 years of age and she was allured and kidnapped from her father's lawful guardianship, he was liable to be convicted for offence punishable under Section 366 of the I.P.C. Accordingly, the accused was convicted for the offences punishable under Sections 376 and 366 of the I.P.C. Taking into consideration the circumstances of the case, the learned trial Court awarded the sentence of R.I. for 6 years and fine of Rs.1,000/- for the offence of rape punishable under Section 376 and sentence of R.I. for 4 years and to pay a fine of Rs.1,000/- for the offence punishable under Section 366 of the I.P.C.

4. The accused has challenged the conviction and sentence. According to him, the trial Court committed error in holding that the prosecutrix was less than 16 or 18 years of age and that the accused had allured or taken her away. The State has also preferred an appeal for enhancement of sentence for the offence punishable under Section 376 of the I.P.C. It is contended that the prosecutrix was a minor girl below 16 years of age

when she was raped by the accused and as per the provisions of Section 376, the offence is punishable with life imprisonment or imprisonment, which may extend to 10 years but shall not be less than 7 years. It is contended that the trial Court committed error in awarding sentence of imprisonment of 6 years in violation of minimum prescribed sentence.

5. Heard Mr.Gavand the learned counsel for the accused/appellant and Ms.Gajare, the learned APP for the State. With the help of the learned counsel for both the parties, I have gone through the complete record and proceeding as well as judgment rendered by the trial Court. Evidence of P.W.1 Chandrakant Patil who is father of the prosecutrix and P.W.2, who is prosecutrix reveals that they were living at village:Vashi. Accused was also living in the same locality at a short distance with his minor daughter and son. Wife of the accused had expired. Therefore, to do some household work and to look after the minor children, the accused had engaged the prosecutrix. She left the parents house on 14-11-2002 at about 2.30 p.m. saying that she was going to her maternal uncle but she did not come back. Evidence on record reveals that after the search she could not be found and therefore, on the next day her father lodged a missing report at the police station.

On 25-11-2002 P.W.1 Chandrakant Patil lodged another report against the accused wherein he contended that since the day his daughter was missing from the house, the accused was also not seen in the village and they were noticed together at some other village. Therefore, the offence came to be registered. Their photographs were sent to different places and finally during the search, they were found in the house of one Sakharam Patil at village:Gadab. Both of them were taken in custody.

6. Evidence of the prosecutrix reveals that accused had asked her whether she would be willing to marry him and he also asked her to come to Vashi naka. In view of this on the relevant day i.e., on 14-11-2002 at about 2 to 2.30 p.m. she left her parents' house and went to Vashi Naka. The accused was present there. He took her to village Gadab and they stayed together in rented house for a period of about 15 days. During that period they used to have sexual intercourse. Finally police came and took them to the police station. Both were subjected to medical examination. The evidence of P.W.3 Dr.Mahananda Mhatre reveals that on 30-11-2002 she had examined the prosecutrix at Rural Hospital, Pen and on examination she found that prosecutrix was habituated to the sexual intercourse and accordingly, medical

certificate at Exhibit 13 was issued. Evidence of the prosecutrix, corroborated by the medical evidence, has not been shattered. There is no reason to disbelieve the same. From this evidence, it becomes clear that the accused had proposed to marry prosecutrix and had asked her to come to Vashi Naka on the next day and accordingly, she went there where the accused was present and from there he took her to village Gadab where they lived together for about 15 days in rented house as husband and wife.

7. Next important question is pertaining to the age of the prosecutrix. As per the testimony of the proseutrix and her father, date of her birth was 24-5-1988. Evidence of P.W.4 Gajanan Patil Headmaster of the school, where she was studying, also reveals that in the school record date of her birth was recorded as 24-5-1988. She was admitted in the school in 6th standard. He did not have record about her earlier school but the learned Trial Court noted that date of birth of the prosecutrix must have been noted in the school register on the basis of the date given by her father and that he had no reason to give false date or to show her younger than what she was because at the time of her admission in the school nobody could anticipate that in future such an incident will occur

and it would be required to prove that she was minor or below 16 years of age.

8. Besides this oral evidence and the school record, evidence of P.W.5 Dr.Uttam Javale, who was radiologist in the Civil Hospital, Alibag reveals that on the basis of ossification test, the age of the girl was found to be between 14 and 16 years. P.W.3 Dr.Mahananda Mhatre, who had referred her for ossification test for the verification of the age, also deposed that on the basis of X ray plates and the X ray reports, she found that the age of the girl was about 15 years. Naturally this was based on the X ray reports and the report of the radiologist, which reveals that the age of the girl was between 14 to 16 years. In any case, even as per the medical examination and the ossification test, girl was not 16 years or above. If this evidence is read in the light of the oral testimony of her father and the school record, it becomes clear that she was 14 and half years at the time of this incident. Therefore, it is clear that she was less than 16 years and, therefore, her consent for sexual intercourse was irrelevant and immaterial.

9. Evidence on record clearly shows that the accused allured prosecutrix to leave her parents' house

and to accompany him by promising her to marry her and it appears that she also accepted that offer and, therefore, she left her parents house and accompanied the accused. Thereafter, the prosecutrix and accused lived together and indulged in the sexual intercourse for a period of about 2 weeks. When she was taken away from the guardianship of her father, she was just 14 and half years and therefore, the offence of kidnapping was committed. This was with clear intention that she would be subjected to sexual intercourse and therefore, the offence under Section 366 of the I.P.C. is proved. Not only this she was actually subjected to sexual intercourse for a period of about 15 days, though with her consent but as her consent was irrelevant in view of her age, the offence under Section 376 was also committed. In view of this, I find no fault with the conviction of the accused for the offence punishable under Sections 366 and 376 of the I.P.C.

10. The offence under Section 376 of the I.P.C. is punishable with imprisonment for a term which shall not be less than 7 years but which may be for life or for a term, which may extend to 10 years and also with fine. Thus, Section 376 mandates with the sentence of imprisonment in the case of rape shall not be less than 7 years. However, this is subject to proviso that the

Court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment for a term of less than 7 years. This discretion is given to the Court in awarding less than the prescribed sentence of imprisonment of 7 years but for this the Court has to give adequate reasons. The learned trial Court, while awarding sentence of imprisonment of 6 years for the offence punishable under Section 376 of the I.P.C. has recorded reasons that the prosecutrix was below 16 years of age and was not competent to give valid consent but she was not a small child. She was aged about 14 and half years of age and the accused, whose wife had died and who was to look after his two minor children, offered the prosecutrix to marry him. It appears that she also accepted this offer and therefore, she left the house of her parents and joined him at Vashi naka. She left the house of her parents with intention to marry the accused and they lived together as husband and wife and indulged in sexual relations for a period of about 15 days in rented house. The learned trial Court noted that even according to the prosecution the accused had not forced her to accompany him nor he had forced her for sexual intercourse. Though legally she was not competent to give valid consent, still it has to be noted that she had infact given her consent with clear understanding

that she wanted to marry him. In these circumstances the learned trial Court felt that it was not necessary to award minimum prescribed sentence of imprisonment of 7 years. In my opinion, the learned trial Court has given very sound, cogent and adequate reasons for awarding sentence of imprisonment less than the minimum prescribed by law. Taking into consideration the facts and circumstances, sentence awarded by the trial Court on both the counts appears to be just and reasonable and needs no interference.

11. For the aforesaid reasons, both the appeals stand dismissed.

(J.H.Bhatia,J.)